IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 347

ERNEST NEWTON KALB,

Petitioner,

vs.

YELLOW MANUFACTURING ACCEPTANCE CORPORATION,

Respondent.

On application for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

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SUBJECT INDEX

Table of Cases.

AUTHORITIES CITED.

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Preliminary Statement.

All emphasis in this reply brief is supplied unless otherwise stated.

The Order of this Reply Brief.

This reply brief will reply to "Respondent's Brief" in the same order of that brief, using its paging as headings.

"Respondent's Brief" Page 2, Middle of Page.

The "Respondent's Brief says: "Attached to the petition and constituting a part of the proposal is the following." [Farmer Debtor's proposal under Section 75(a) to (r) to the Y.M.A.C. as a secured creditor.]

REPLY:

It is probably immaterial but the proposal was **not** attached to or filed with the petition. The petition was filed with the clerk of the District Court and the proposal was filed with the conciliation commissioner at a later date. See "Docket Entries of Conciliation Commissioner," R. 4, entry of July 1, 1941, second paragraph. Also see the "Petition and Brief" for petitioner at page 16, note 2.

"Respondent's Brief" Bottom of Page 2 and Top of Page 3.

REPLY:

The record does not show—and it is not true—that the respondent's secured claim "was considered by the conciliation commissioner and after discussion thereon an agreement was made at the hearing approved by the conciliation commissioner and agreed to by the petitioner" that payments would be made to the conciliation commissioner. The creditors' meeting was adjourned without consideration of the proposal because of the petition filed by the real estate mortgage holders to have real estate disclaimed. See "Docket Entries of Conciliation Commissioner." R. 4 to 5, record of creditors' meeting under date of July 1, 1941. Concerning the so-called petition of the Y.M.A.C. which

the docket of the conciliation commissioner seems to show was filed that day (but was not even verified until 16 days later) see the "Petition and Brief" for the petitioner at page 17, note 3.

"Respondent's Brief" from the First Paragraph on Page 3 to the Middle of Page 10.

REPLY:

These seven pages of matter are lugged into the "Respondent's Brief." None of it appears in the record with the exception of the six lines at the foot of page 9, quoted from the proposal to creditors at the bottom of R. 14 and the 13 lines at the top of page 10 quoted from a paragraph of the appellate court's opinion at R. 33.

It is repeated **that there was no agreement** at the creditors' meeting or at any other time or place that the farmer debtor would pay the respondent anything.

The respondent, like the opinion of the appellate court below, treats the unaccepted proposal to creditors, filed under Section 75(a) to (r), as if it were a contract. It was never considered or acted upon by the creditors—never accepted—never presented to or confirmed by the judge,—all of which are the mandatory requirements of Section 75(g) and (i) before it becomes binding. (The whole of Section 75 is inserted in the "Petition and Brief" for the petitioner at page 14.)

The reason why the proposal was not considered was because the creditors' meeting was indefinitely adjourned due to the mortgage holder's petition to disclaim real estate. The meeting still stands adjourned. See the "Petition and Brief" for the petitioner at page 16, third paragraph at the middle of the page.

Although the matter on pages 3 to 10 of "Respondent's Brief" does not merit attention, **because it is not in the record** (no designation for it having ever been filed), it is perhaps advisable to make the following statements concerning it.

1. It is of **conclusive significance** that the respondent, when it lugged this extraneous matter into its brief, **did not also include two other papers** that were a part of it. these papers were:

   a. A letter dated July 19, 1941, from respondent's counsel to the conciliation commissioner, and

   b. A blank form of proposed "Order to Show Cause."

2. These two papers are here copied in full, exactly as they came to the petitioner's counsel from counsel for the respondent. They follow:

"Law Offices COPY
ADOLPH I. MANDELKER
606 W. Wisconsin Ave.
Milwaukee, Wisconsin

Phone: Marquette 2024

July 19, 1941

Mr. George H. Belton
Conciliation Commissioner
Elkhorn, Wisconsin

Re: Ernest Newton Kalb

Dear Sir:

I have not heard from you to the affect that the above party has made payment on the trucks upon which my client, Yellow Manufacturing Acceptance Corporation,

has a lien and I take it that no such payment has been made.

I believe that the agreement made in your Court on July 1st was of a definite enough nature so as to give you the authority, if you desire, to exercise it to sign the enclosed order which is based upon my petition asking for the same.

I am sending a copy of this letter and the petition to Mr. Kalb and am also sending one to his attorney, each by registered mail, and it is my belief that if you do not hear from either of them, either with payment or a petition asking that you deny my petition, that I am within my rights in asking that the enclosed order be signed.

Please understand that I am not attempting to take upon myself the operation of your Court as a Conciliation Commissioner, but I am merely trying to cut through some of the red tape to protect my client from serious loss in this matter.

I assure you that your consideration of the matter will be very much appreciated.

AIM:eh
Enclosure

Very truly yours,
Adolph I. Mandelker"

(b)

"In the District Court of the United States
For the Eastern District of the
State of Wisconsin

In the Matter of
Ernest Newton Kalb,
Debtor.

Order to Show Cause

At Elkhorn, Wisconsin, in said District on the ..... day of ....., 1941:

Upon the annexed petition of Adolph I. Mandelker, attorney for Yellow Manufacturing Acceptance Corporation, verified on the ..... day of July, 1941, and filed in this Court, it is

Ordered that Ernest Newton Kalb surrender to Yellow Manufacturing Acceptance Corporation the vehicles described in said petition on or before the ..... day of ....., 1941, and it is further

Ordered that service of this order and the annexed petition upon said Ernest Newton Kalb be had not less than ten (10) days prior to the time set for surrender of the vehicles.

Dated at Elkhorn, Wisconsin, this ..... day of ....., 1941.

.....

Conciliation Commissioner."

These papers will now be discussed:

(a) The said letter of July 19, which had just been copied refers to an agreement of July 1 as being "of a definite enough nature so as to give you" [the Conciliation Commissioner] "the authority, if you desire, to exercise it, **to sign the enclosed order.**" There had been no agreement whatever. The "enclosed order" was the blank, unsigned, skeleton form headed "Order to Show Cause" which is copied above in full under (b).

This letter further says that the author is not "attempting to take upon myself the operation of your court as a conciliation commissioner, but I am merely trying to **cut through some of the red tape.**" The "red tape" respondent is trying to escape is Section 75(o), which in another case originating in Wisconsin was held by this court to be mandatory upon a state court. *Kalb* v. *Feuerstein*, (1940), 308 U. S. 433. Section 75(p) makes Section 75(o) equally mandatory upon all other courts.

It will be noted that this letter **does not ask the Conciliation Commissioner to file anything.** It merely asks, and that only by implication, that the Conciliation Commissioner sign **the enclosed order.** No order to show cause was issued. The suggestion that it be issued was ignored.

(b) The blank form headed "Order to Show Cause" is copied above exactly as it was received. Neither the petitioner nor his counsel ever received anything concerning it other than the said letter of July 19 and the enclosed blank form.

Immediately upon receipt of the documents "(a)" and "(b)" and of the proposed "petition" enclosed with it, counsel for the petitioner wrote the conciliation commissioner the letter which is copied at pages 15 to 17 of "Respondent's Brief". That letter vigorously objected to the proposed procedure, saying the conciliation commissioner had no power to issue such an "order," and that the "red tape" referred to by the respondent was the legal provisions enacted to protect the farmer debtor and his property from such an attempt. He was advised that the respondent was asking what this court has decided may not be done. Nothing further was heard of it.

It is very clear that it is not true, as the "Respondent's Brief" says at page 17, that the peitioner "had actual knowledge and notice that the same [the "petition"] had been filed with the conciliation commissioner." The letter from the respondent to the conciliation commissioner did not ask him to file the "petition", it suggested that he issue the "order to show cause". **The Conciliation Commissioner did not issue that or any other order to show cause.**

The petitioner and his counsel never heard anything more about the subject until counsel for the respondent appeared before the Judge of the District Court on Motion Day, August 5, 1941, and without notice or hearing, asked for an order and got it. That is the final order at R. 17 to 18. It was undoubtedly drafted by the respondent and presented to the judge for signature. Its peculiar verbiage is discussed in the "Petition and Brief" of the petitioner at page 33.

"Respondent's Brief" Bottom of Page 10 to Top of Page 11.

The "Respondent's Brief" correctly assumes:

1. That the appellate court held the bankruptcy court had a **discretion** to order the farmer debtor to surrender his property to the secured creditor, and

2. That it held the order (R. 17 to 18) only effects **possession.**

3. That it held Section 75(e) gives the bankruptcy court power to **change the possession** of the farmer debtor's property from the farmer debtor to a secured creditor—that is to deprive the farmer debtor of his property and force him to surrender it to the mortgage holder.

4. That it held the farmer debtor **failed to keep his promises.**

5. That it held the farmer debtor **tried to change his promises.**

6. That it held the farmer debtor **tried to avoid a hearing.**

Every one of these holdings by the appellate court is unwarranted.

1. The District Court has no "discretion" to order the "seizure", "distress", "or other proceedings" under any "lien, chattel mortgage, conditional sale . . . or mortgage" (quoted from Section 75(o)) except as provided in Section 75(o). Not one of the requirements of Section 75(o) was complied with.

2. The order (R. 17 to 18) at R. 18 requires the petitioner **"to surrender and deliver** to Yellow Manufacturing Corporation" his chattels **unconditionally.**

There is **not a word about "possession"** in the order.

3. Section 75 (e) does **not empower the bankruptcy court to take the farmer debtor's property from him and give it to the secured creditor.**

To **"control"** the farmer debtor's property **does not mean to take it away from him.**

To **"control"** the farmer debtor's property **does not mean to give it to another.**

If the word **"control"** in Section 75(e) is a "weazel word" that gives the bankruptcy court summary power, via "discretion" to order the farmer debtor to surrender his property to his secured creditor, then indeed Section 75 as a whole and Section 75(n), (p), and the decisions of this court on Section 75 in particular are all swept away. Section 75 would thus effectively be repealed by judicial legislation.

4. Whether the phrases "failure to keep the promises," "change the promise" refer to (a) the proposal to creditors (R. 13 to 15) which was never presented to creditors or considered by them, or (b) to a fictitious "agreement" be-

tween the farmer debtor and the secured creditor in some way outside the pending proposal, it is impossible to discover.

But the farmer debtor was never bound by either. The court did not "confirm the proposal" (quoted from Section 75(i)) and no outside agreement was ever made.

5. It is deemed that the phrase "his effort to change the promises" needs no further discussion.

6. It is impossible to discern what is referred to by the phrase "the debtor's effort to avoid the hearing."

a. If it is meant that he tried to avoid a hearing before the conciliation commissioner, the answer is that the conciliation commissioner never set a hearing. Not a word came from the conciliation commissioner on the subject.

b. If it is meant that he tried to avoid a hearing before the bankruptcy court on August 5, 1941, he rightly refused to enter into a hearing on a subject when he had no notice whatever that there was to be such a hearing and did not even know that an application for an order had been filed.

If the Fifth Amendment means anything, it condemns as futile the respondent's attempt to misuse judicial process. It was so held in the authorities and decisions in the discussion of this subject at pages 30 to 32 of the "Petition and Brief" of the petitioner.

The Cases Cited in "Respondent's Brief"
"Respondent's Brief" Page 12.

Continental v. *Rock Island* (*Continental* v. *Chicago, etc.*), (1935), 294 U. S. 648. This case arose under Section 77, the Railroad Debtor Law of 1933, which contained no provision comparable to Section 75(o) or (p). It did have a provision comparable to the general provision in Section 75(n) reposing exclusive jurisdiction over the debtor and the debtor's property. Under this general provision this court held that the bankruptcy court had power **to restrain the mortgage holder** from exercising any control over the debtor's property even though the contract between the debtor and the mortgage holder specifically provided for such control and sale of the security.

The holding was that the **bankruptcy court had discretion** under its general exclusive jurisdiction **to hold the security** in the hands of its owner **not to surrender it** to the mortgage holder.

"Respondent's Brief" Page 12.

Heffron v. *Western Loan* (1936), CCA 9, 84 Fed. (2d) 301. This case involved an **involuntary petition in regular bankruptcy** under the Bankruptcy Act of 1898. No debtor proceeding was involved. **Three years** before adjudication the bankrupt gave a mortgage. The mortgagee sold the security at private sale one day after the involuntary petition was filed. The court held that although the bankruptcy court had power to administer the security, since the sale was held one day after the jurisdiction of

the bankruptcy court attached, yet the sale would not be disturbed as there was no asset in the security for general creditors.

This correct **general bankruptcy** law. The court rightly held that under the Act of 1898 a bankruptcy court had a discretion to administer mortgaged property if there was any excess of value ("equity") for the general creditors or to disclaim it if no such benefit to the creditors existed.

On the contrary the whole purpose of **the farmer debtor law** is that the bankruptcy court shall **retain its jurisdiction over mortgaged security regardless of its inadequacy to meet the debt secured by it,** so that the farmer debtor may eventually **redeem it at its value,** regardless of the amount of the debt.

No such discretion in the bankruptcy court to surrender a farmer debtor's property to a creditor, as claimed by the respondents, exists and not a single citation in its support has ever been put forward by the respondent.

"Respondent's Brief" Page 14.

In re Henderson (1938), CCA 5, 100 F. (2d) 820. This was one of the three decisions of the Fifth Circuit cited by this court in *John Hancock* v. *Bartels,* 308 U. S. 180, at 181, Note 3, as reasons for granting certiorari. The *Henderson* decision was overruled. It dismissed a farmer debtor case for "lack of good faith." A subsidiary point, the one on which respondent relies, was that the farmer debtor's petition was dismissed before the expiration of three months from the creditors' meeting under Section 75(a) to (r), without notice. No time had been fixed for

the filing of an application for confirmation of the proposal. In view of General Order No. 50 (4) directing the conciliation commissioner to fix a time "not later than three months" the dismissal was premature on any ground. The strongest expression of the First Circuit Court on this subject was that "**It may be questioned** whether or not" the farmer debtor could object to such procedure because he must at all times keep track of all papers filed in the office of the clerk of the district court by either the conciliation commissioner or by the supervising conciliation commissioner! But this theory of sidestepping the Fifth Amendment is overwhelmingly repudiated by the courts. See pages 30 to 32 of the "Petition and Brief" of the petitioner filed in this case which covers both farmer debtor and regular bankruptcy cases.

"Respondent's Brief" Page 14.

Massey v. *Farmers, etc., Bank* (1938), CCA 4, 94 Fed. (2d) 526. This was another case which dismissed a farmer debtor proceeding for "lack of good faith" and was overruled by *John Hancock* v. *Bartels*, 308 U. S. 180. The decision did not rest upon the assumption that, as stated by "Respondent's Brief," "in agricultural composition proceedings a debtor is bound to take notice of the filing of the conciliation commissioner's report recommending dismissal." On that subject the opinion says:

> "Counsel had an opportunity to be heard and an opinion was filed on December 17, 1937, in which the facts were discussed on their merits and the absence of good faith was noted that was as essential to the maintenance of the original as of the amended petition. The debtor was not denied an opportunity for a fair hearing."

The court also criticized the bankruptcy court for not giving notice to the farmer debtor of the filing of the Conciliation Commissioner's report, saying: "It would be proper practice" to direct the farmer debtor to show cause why his petition should not be dismissed on the basis of the report of the conciliation commissioner that there was 'lack of good faith'."

This is the last of the only authorities cited by the respondent. The lack of a single citation of authority in support of the final order of October 20, 1941, at R. 17 to 18, is decisive.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for the Petitioner,
Ernest Newton Kalb.

Lima, Ohio
September 21, 1942